

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:OHI:CIN:TL-N-6409-99
JEKagy

date:

to: Chief, Examination Division, Ohio District
Attn: Revenue Agent Robert Fox (E:EB6:1632)

from: Assistant District Counsel, Ohio District

subject: [REDACTED]
Attorney-client Privilege

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This memorandum responds to your October 26, 1999 request regarding the taxpayer referenced above. In particular, you question the propriety of the taxpayer's assertion of the attorney-client privilege regarding certain legal opinions obtained by or on behalf of the taxpayer as part of a "lease in lease out" (LILO) transaction.

ISSUE:

Whether the taxpayer may legitimately withhold the legal opinions identified below under the theory that the documents are protected against disclosure by the attorney-client privilege.

CONCLUSION:

The legal opinions identified below, while possibly protected under the attorney-client privilege, must be disclosed in this instance since the privilege has been waived by the voluntary disclosure of the opinions to third parties.

FACTS:

For purposes of this memorandum, [REDACTED] owns two single asset subsidiaries, [REDACTED] and [REDACTED]. Each of the subsidiaries entered into a "lease in lease out" (LILO) transaction with a [REDACTED] municipality, namely [REDACTED] and [REDACTED]. The agents are anticipating raising an issue similar to the Service's position in Rev. Rul. 99-14, but are still gathering facts.

As part of their audit, the agents issued an IDR asking for "any opinions written by attorneys, accountants, or other qualified persons regarding the tax treatment of the LILO transactions". The taxpayer has furnished neither a privilege log nor any documents responsive to the IDR. Instead, not totally unexpectedly, the taxpayer responded as follows:

Any available opinions that [REDACTED] ([REDACTED]) has would be subject to attorney/client privilege and therefore would not be available to be provided to the IRS.

The agents have identified a number of legal opinions they believe might be responsive to the IDR. In both LILO transactions, a Participation Agreement was executed by several [REDACTED] limited liability companies, a U.S. bank acting as trustee, and the [REDACTED] subsidiary. In that regard, we believe that it is safe to assume that the signatories to the Participation Agreement are not all related or controlled by [REDACTED]. Moreover, according to page twelve of the Participation Agreement, each of the signatories was provided with a copy of eight (8) separate legal opinions relative to the various parties' ability to perform under the agreement. The agents are seeking, among other things, copies of those legal opinions specifically identified in the Participation Agreements.

ANALYSIS:

The attorney-client privilege arises:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his advisor, (8) except the protection be waived.

8 J. Wigmore, Evidence, sec. 2292 at 544 (J. McNaughton rev. ed. 1961).

The privilege is meant to encourage full and frank discussions between attorney and client and thus promote adequate legal representation for all litigants. Upjohn Co. v. United States, 449 U.S. 383 (1981).

While it is clear that the attorney-client privilege may be waived, it is more important to note that once the document or privileged communication has been disclosed to an outsider, whether by the client or the attorney with the client's authority, the communication generally loses its protection by the attorney-client privilege. See Teachers Insurance and Annuity Association of America v. Shamrock Broadcasting Co. Inc., 521 F. Supp. 638, 641 (S.D.N.Y. 1981). In that regard, if the client makes public a document containing communications otherwise privileged, the privilege is held to be waived. In re Horowitz, 482 F.2d 72, 81 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

APPLICATION:

The taxpayer's response to your IDR should be considered unacceptable. First, to the extent the taxpayer has identified documents responsive to your request, but has withheld the disclosure of the documents due to the assertion of some privilege, you are entitled to a privilege log which specifically identifies each document withheld and specifies to whom and from whom the document was sent, to whom copies have been sent, the document's subject matter, length, and attachments, and the nature of the privilege asserted. Second, to the extent you have identified specific legal opinions which are in the possession of the taxpayer and which you believe could be relevant to your fact gathering, you should ask specifically for those legal opinions.

We advise that, at a minimum, you should renew your request, but modify it to ask for:

all opinions, studies, projections, memoranda, correspondence or other documents, whether written by attorneys, accountants or other advisors, regarding your decision to consider or enter into the LILO transactions mentioned above.

We note in passing that the mere fact that an attorney has offered an opinion in response to a client's request does not automatically lead to the conclusion that the advice is protected by the attorney-client privilege. The facts surrounding each document need to be explored. For instance, a taxpayer cannot argue that it relied on advice of counsel, and then refuse to divulge the document as privileged. See Ampex Corp. v. United States, 207 Ct. Cl. 1014, 1015 (1975).

Your IDR should also specify that if any documents are identified as responsive to the request but are withheld as protected by some privilege, the taxpayer should prepare a detailed privilege log, containing the information identified above.

We also advise that your IDR specifically request copies of the legal opinions identified in the Participation Agreements. Parenthetically, those legal opinions probably deal more with the parties' authority to enter into such a deal than with the parties' thinking about why the deals were struck. Nevertheless, we believe that you are entitled to those opinions. It appears that the legal opinions identified in the Participation Agreement have been disclosed to outside third parties, and that the privilege has been waived with regard to those specific documents. Accordingly, we encourage you to pursue those specific opinions listed in the Participation Agreements.

As additional facts come to light or as further arguments are raised by the taxpayer, please keep us informed so we may be of assistance to you as you attempt to secure those documents to which you are entitled. As always, you may reach us at (513) 684-3211.

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